GOH KHIOK PHIONG v. REGINA.

[C. A. (Smith, Rogers & Bodley JJ.) July 7, 1954]

[Kuching — Criminal Appeal No. 5 of 1954]

Sarawak — Penal Code, s. 413 — Habitually receiving stolen property — Evidence to justify conviction — Charge — Particulars of specific acts of receiving should be set out in the charge — Power to view locus in quo — Criminal Procedure Code (Cap. 62), s. 228 — Definition of "stolen property" — Penal Code, s. 410 — Evidence of participation in the offence — Accomplice.

The proper way to draft a charge under s. 413 of the Penal Code is to set out therein particulars of specific acts of receiving which should show the date or approximate date when the property was received.

It would be necessary to prove at least three prior acts of receiving, that is to say, four acts of receiving in all before it could fairly be said that the accused was an habitual receiver. It is not necessary that the accused should have been convicted of receiving but it is necessary that the proof of these prior acts should be as convincing as if he had been convicted, for it is those acts which determine the applicability of the offence under s. 413 of the Penal Code and the enhanced penalty provided therefor.

Section 228(1) of the Criminal Procedure Code authorises the Court to visit the *locus in quo*. Sub-s. (2) of s. 228 enacts that the Judge or Magistrate shall direct that the accused shall be present when the Court visits the *locus in quo*. Non-compliance with the provisions of sub-s. (2) will be regarded a serious error since it disregards a mandatory direction of the Code and also offends against the elementary principle of justice that nothing to the prejudice of a person should be done behind his back.

The definition of "stolen property" in s. 410 of the Penal Code excludes property in respect of which cheating has been committed. *Quaere:* whether property obtained by a trick can be said to be entrusted under s. 405 of the Penal Code.

In deciding whether a witness should be treated as an accomplice the trial Judge should ask himself this question: "Is there any evidence upon which I can properly rule that the witness was a participant in the offence?"

[**Editorial Note:** s. 413 of the Sarawak Penal Code is identical with s. 413 of the Penal Codes of Singapore and the Federation. The Sarawak Penal Code, s. 410 excludes "cheating" in the definition of "Stolen Property".]

Case referred to:—

(1) *Davies v. Director of Public Prosecutions* (1954) 1 All E.R. 507; (1954) 2 W.L.R. 343;

CRIMINAL APPEAL heard by the Court of Appeal of Sarawak, North Borneo and Brunei, holden at Kuching.

David Marshall for the appellant.

Peter Mooney (Crown Counsel) for the respondent.

Cur. Adv. Vult.

The facts and arguments appear sufficiently from the judgment of the Court delivered by:—

Smith J.: —This is a puzzling case to which the Court has given anxious consideration. The appellant, Goh Khiok Phiong, is a business man of some standing who owns a fleet of lorries and carries on a transport business in and around Kuching. The name of his business is Meng Hong and his lorries are referred to as Meng Hong lorries. The appellant was charged and convicted of the offence of habitually receiving stolen property contrary to Section 413 of the Penal Code, Cap. 61 of the Laws, and the particulars of the offence were set out as follows:—

"That you on or about the 28th day of November, 1953, at Kuching were an habitual receiver of property, to wit, petrol belonging to the Public Works Department of the Government of Sarawak which you had reason to believe to be stolen property and that you thereby committed an offence punishable under section 413 of the Penal Code."

The facts on which the Crown relied may be summarised shortly as follows. There is a petrol pump in the garage of the Public Works Department in Kuching of which a Government employee named Dol bin Sapar was in charge. The pump is fed from a tank containing the petrol. Dol had been doing this work for thirty years and had impressed the learned trial Judge as a reliable and trustworthy man. The clerk in charge of the petrol pump was a man named Dennis Encharang who was himself charged with an offence alleging malpractices in connection with petrol but the Court is informed that he died before the case was heard. When Dol's petrol tank needed replenishing he would apply to Dennis for a stores requisition-issue voucher specifying the number of drums of petrol required, generally five drums or fifteen drums. The capacity of each drum is forty-four gallons of petrol. Examples of such vouchers are exhibited as Exhibits Nos. E1 to E 17. These vouchers were addressed to the "Government Store" which is controlled by the Public Works Department. Dol would take these vouchers to the storekeeper at the Government store. The storekeeper in exchange for the voucher would issue what may be called an order to deliver petrol which was addressed to the Borneo Company Limited. None of these orders was exhibited. Armed with an order Dol would go to the Borneo Company where he would receive in exchange a numbered bill signed by an official of the Borneo Company which authorised the issue by the storekeeper of the Borneo Company of the releyant number of drums of petrol mentioned in the bill. The storekeeper of the Borneo Company was a man named Ibrahim bin Sahari who also struck the trial Judge as a reliable man. Such bills were exhibited as Exhibit O. The consignee of the petrol is described in the bill as "Sarawak Government Store (A/c Garage)" and the cost of the petrol

is debited to the Sarawak Government. It is alleged that when fifteen drums were ordered, ten of these drums would be conveyed in a Government lorry by Dol to the petrol pump at the garage for the purpose of replenishing the tank. The remaining five drums, it is alleged, were fraudulently loaded into Meng Hong lorries. When only five drums were ordered, the entire consignment of five drums, it is alleged, were fraudulently loaded into Meng Hong lorries. Dol never took any receipt from the drivers of these Meng Hong lorries who carried off these drums of petrol. The learned trial Judge correctly took the point that in view of the large amount of transport business carried on by the Meng Hong lorries, the mere fact that the petrol was loaded into Meng Hong lorries was not by itself sufficient to connect the appellant with this apparent fraudulent conversion of Government petrol. It is said however, that on one occasion, on the 28th November, 1953, the appellant was present in person at the place where the petrol drums in the Borneo Company yard are stored and made some such remark to Dol as "Has Dennis Encharang given me five drums benzine (petrol)?" This it is said is sufficient to connect the appellant not only with the five drums of petrol issued on that day, but also with all the prior deliveries of petrol which were made direct into Meng Hong lorries. In addition the appellant admitted when he gave evidence that on three occasions, not clearly specified, he did receive petrol from the Borneo Company store under the authority of Government "orders" but the trial Judge did not believe that the transaction was authorised by any Government order.

The first criticism was that the charge was so vague as to be misleading. As no particulars of prior acts of receiving are given, it is not easy to ascertain on what precise facts the prosecution bases its case. Presumably it is the seventeen stores requisition-issue vouchers issued by Dennis in his handwriting between May and November, 1953. They are produced in evidence in a bundle by Dol who states "Ex. E is a lot of benzine orders." They are referred to only in a general way and do not seem to have been considered individually, as they should have been, since each one is apparently intended to establish a separate act of receiving upon which the charge of habitual receiving is based. The Court is of opinion that the proper way to draft a charge under section 413 is to set out therein particulars of specific acts of receiving which should show the date, or approximate date, when the petrol (in this case) was received and the amount of petrol so received. It would be necessary to prove at least three prior acts of receiving (that is to say, four acts of receiving in all) before it could fairly be said that the accused was an habitual receiver. It is not necessary that the accused should have been convicted of receiving but it is necessary that the proof of those prior acts should be as convincing as if he had been convicted, for it is those acts which determine the applicability of the offence under section 413 and the enhanced penalty provided therefor — See *Gour's Penal Law of India,* 1936, at page 1415. The point that a prior conviction was an essential pre-requisite to a charge under section 413 was taken by Mr. Gunston who appeared at the trial. Mr. D. S. Marshall who appeared for the appellant abandoned this point on the appeal — rightly so, in the opinion of this Court. Mr. Gunston, however, made no complaint of the insufficiency of the charge either at the preliminary inquiry or at the trial. It is too late to do so now. The defective charge would therefore not be a fatal defect by itself in the particular circumstances of this case.

A more serious criticism was that the accused was not present when the Court adjourned to view the premises of the Borneo Company where the drums of petrol were stored. Mr. Gunston was present, but not the appellant. Dol and Ibrahim were present and indicated the position where they saw the appellant standing in the Borneo Company yard on the 28th November, 1953. Section 228(1) of the Criminal Procedure Code authorises the Court to visit the *locus in quo.* Sub-section (2) of that section originally reads as follows :—

> "(2) The Judge or Magistrate *may* direct that the accused shall be present, and he may take evidence at such place or places."

In 1951, however, the Criminal Procedure Code (Amendment) Ordinance (No. 21 of 1951) was passed and Section 73 of that Ordinance amended sub-section (2) of section 228 by substituting the word "shall" for the word "may" in the first line so that the sub-section now reads : "The Judge or Magistrate *shall* direct that the accused shall be present." The Court no longer has a discretion is the matter — there is a mandatory and imperative direction to the Court to ensure that the accused in personally present on such occasions. The legislature apparently considered the point of sufficient importance to amend the law on the subject. What is the legal result if this point is overlooked and the accused is not present? There is no particular magic in words and to describe a failure to comply with this provision as an illegality or an irregularity does not seem to assist greatly in arriving at an answer to the question. Suffice it to say that non-compliance with this provision must always be regarded a serious error since it disregards a mandatory

direction of the Code and also offends against the elementary principle of justice that nothing to the prejudice of a person should be done behind his back. Subject to the proviso to Section 4 of the Criminal Appeal Act, 1907, failure to comply with this requirement would generally have to be regarded as fatal to a conviction, particularly if material evidence is taken at the *locus in quo*. In the present case the Court understands that Mr. Gunston tacitly waived the accused's right to be present although the evidence given on the spot related to a crucial point in the case. This Court is not prepared to say therefore that it would have quashed the conviction here on this ground alone if there had been other unimpeachable evidence which brought the offence home to the appellant.

Another point raised by Mr. Marshall was whether the petrol was legally stolen property within the meaning of that expression as defined in Section 410 of the Penal Code. Stolen property is there defined as property the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed. The definition excludes property in respect of which cheating has been committed. It seems to have been assumed in the lower Court that the petrol was stolen property but the point is not so simple. The Borneo Company parted with possession of the petrol on the strength of a valid order from the storekeeper at the Government Store. But the storekeeper was misled into issuing that order because Dennis had submitted a fraudulent stores requisition-issue voucher. That voucher was fraudulent in this sense. When Dennis requisitioned for fifteen drums he led the storekeeper to suppose that Dennis required the entire consignment for legitimate distribution from the petrol pump at the garage at the Public Works Department. When Dennis requisitioned for five drums, the storekeeper imagined that the five drums were destined for the petrol pump but the evidence shows that they found their way into the Meng Hong lorries. It seems to this Court that the storekeeper was induced by this fraud to deliver to Dennis a petrol order, that is to say, a document which authorised the holder to receive drums of petrol from the Borneo Company. This document is clearly "property" within the meaning of Section 415 of the Penal Code which is the Section which defines the offence of cheating. It therefore seems that Dennis has obtained the petrol order by cheating. Since it is apparently more convenient for the Government storekeeper to issue a petrol order on the Borneo Company rather than hand over drums of petrol himself it may well be said with some show of logic that Dennis has obtained the drums of petrol, represented by the petrol order, by the offence of cheating. The drums of petrol were not entrusted to Dennis, it may be argued, under Section 405 of the Penal Code — the section defining criminal breach of trust — because they were obtained by a trick and because there was no true consent to the transaction by the Government storekeeper. The answer to this is that certain of the drums of petrol — those that were used to replenish the tank at the petrol pump — were clearly entrusted to Dennis and it may be argued that it is too great a refinement to split up the consignment of petrol into two categories — those drums which were legally entrusted, and those which were obtained by cheating. There are conflicting Indian decisions on the question whether property obtained by cheating under Section 415 can also be property entrusted under section 405. Looking at the transaction as a whole this Court inclines to the view that all these drums of petrol were legally entrusted to Dol as the representative of Dennis and if any of the drums were dishonestly misappropriated, such drums became property "in respect of which criminal breach of trust has been committed" and therefore "stolen property" within the meaning of section 410. It is not necessary for the decision of this case to make a finding on this particular point and therefore the view which the Court takes may be regarded as *obiter*.

Lastly, there is the all-important question of the status of Dol as a witness. Was he an accomplice? The learned Judge considered the point and decided that he was not. This Court is most reluctant to challenge a conclusion of this kind if there is evidence to support it. Mr. E. Bomphrey, a mechanical engineer in the Public Works Department, makes the position clear that all petrol obtained from the Borneo Company on the strength of stores requisition-issue vouchers should be brought to the petrol pump at the garage and put into the tank. This petrol was "for redistribution" through the petrol pump. Dol had been at work on the pump for thirty years and he must have known the correct procedure. If he authorised petrol to be handed over to the Meng Hong lorries surely he should have taken some receipt so that the Government would have some record of the disposal of the petrol for purposes of accounting. It was ruled that Dol was not an accomplice. The question which should have been put by the learned Judge may be expressed thus: "Is there any evidence upon which the trial Judge could properly rule that Dol was a participant in the offence". That is the all-important question as appears from the judgment of Simonds L.C. in *Davies v. Director of Public Prosecutions*[1]. In the opinion

of the Court the trial Judge in ruling, in effect, that there was no such evidence did not give sufficient consideration to the facts that Dol was consistently disposing of Government property on mere verbal instructions from Dennis and without taking any receipt and at a place where his departmental superiors were unlikely to interrupt him. This Court feels impelled to conclude that Dol's suspicions must certainly have been aroused when he saw drum after drum going into Meng Hong's lorries. If he is not an accomplice his evidence must be regarded with the closest scrutiny. Is it safe to conclude that the appellant is sufficiently implicated solely on the strength of the one remark which Dol says he made: "Has Dennis Encharang given me five drums benzine?". In his judgment the learned trial Judge quotes the sentence in Malay, which contains the phrase "*ini hari*", and translates: "Has or has not Dennis Encharang given me petrol *to-day*?" and observes that these words "can only indicate one thing." The Court assumed, and Mr. Mooney confirmed it, that the point of this observation was that the use of the expression "to-day" (ini hari) suggested that the appellant was in the habit of getting petrol from Dennis Encharang. In the record of Dol's evidence on page 2 there is no mention of the phrase "to-day". It seems therefore that there is at least some doubt on the point whether the expression "to-day" was used. The case might have been different if Ibrahim had given clear evidence that the appellant was in the Borneo Company yard on the 28th November, 1953. But what do we find? At the preliminary inquiry Ibrahim said: "I have never seen him (appellant) at the Borneo Company Limited store." Despite the explanation offered, such a vital discrepancy must detract from the value of his evidence given later at the trial. There is another point which calls for comment. On the reverse of Borneo Company bill dated the 28th November, 1953, there is a note which is rather difficult to decipher but which is said to read "5 Meng Hong". Ibrahim says he wrote this note after loading the petrol into Meng Hong's lorry. The learned Judge says that this note has "all the marks of authenticity." It does seem curious, however, that this was the only occasion on which Ibrahim ever made any such note. It is more curious that this bill was not produced in evidence at the preliminary inquiry before the magistrate, Mr. J. R. Blangden. The note does not prove that the appellant was present but it is a most relevant piece of evidence and one would have expected the prosecution to have produced it at the preliminary inquiry. The appellant attempted to establish an alibi which the learned Judge entirely rejected and undoubtedly the invoice produced in support was a highly suspected document. The weakness of the defence, however, does not necessarily compensate for inadequacies in the prosecution case. After most careful consideration the Court finds that the evidence as a whole falls below the standard required in a criminal case and is insufficient to warrant a conviction. It is a case of suspicion — grave suspicion, but suspicion is not enough. The appeal is therefore allowed and the conviction and sentence of three years' imprisonment are hereby quashed.

Appeal allowed.
Conviction and sentence quashed.

Solicitors: *Battenberg & Talma.*